

1. Claimant was employed by respondent almost 7 years, since 1994. His job duties for the first 3½ years included sanding, grinding and polishing parts. He then ran a metal shearer and saws, operated a forklift and worked in the paint room for about 2 years before going to the paint room full time. He continued working in the paint room until his termination in February 2001.
2. All of these jobs involved lifting, but especially the grinding room job that claimant performed during the first 3½ years of his employment with respondent. Claimant initially was able to handle the heavy lifting requirements of his job, but it became increasingly

difficult. About 2 years after he started, claimant began going to a chiropractor to help relieve his symptoms of pain and soreness. Thereafter, he continued to seek treatment but his problems got progressively worse.

Q. And how long did this continue?

A. I've had trouble ever since. Even pain pills that the doctor had given me, the company doctor, I went to the company doctor and he put me on pain pills, and I told them that they weren't even working anymore and he told me to take two pain pills. And it's got to where it's gotten so intense, I can't hardly get off the couch.

Q. So is this something that's started out as bad as it was, as bad as it is right now, or is this something that got progressively worse?

A. No, sir, it didn't bother me at all. When I first started working there, it wasn't annoying, I mean, it wasn't nothing, but it just got to where, like I said, here in the last, right before I was fired, I told my boss that I'm going to have to go get surgery on it, and a week later I was fired.¹

3. Although the paint room job was easier, claimant's symptoms continued to worsen and eventually reached the point where even the paint room job became difficult for him to perform.

Q. Can you describe for us a typical day?

A. I'd have to DA the parts and wipe them down and then paint them, so it was – my actual job at the last was actually a lot easier on me, but it just got to where I couldn't even handle it. My boss told me he was going to have to hire me some help just to do that job because my back was getting so bad.

Q. Now, at that time, did you have an injury that you related to work?

A. Well, I think it was, it was from the repetitive work there, you know, from all the heavy lifting to start with.²

4. Claimant told his boss, Dave Julian, on several occasions that his back hurt from lifting. He received ongoing treatment from the company doctor, Dr. Christopher P. Rodgers, and was even referred out for an orthopedic consult with Dr. Robert L. Eyster and for pain management treatment. Although claimant continued working while he was receiving treatment, claimant was told by Mr. Julian that he was in jeopardy of losing his job.

¹ Tr. of Preliminary Hearing May 22, 2001, at 14.

² Tr. of Preliminary Hearing May 22, 2001, at 12.

Q. Did you and Mr. Julian ever discuss the worsening of your back after 1998?

A. Yes, sir, he told me all the time that I was getting so bad that he was going to have to hire me somebody to help me or get rid of me and get somebody else in there, somebody that can handle the job.

Q. Now, prior to when you told him you needed surgery in February 2001, had you talked about it at that time?

A. Talked about what?

Q. Between '98 and February of 2001, you discussed this?

A. Yes. I mean, yes, yes, sir, he's told me upon several occasions that my back was getting so bad that he was going to have to terminate me or get somebody to help me if I didn't do something about it.

Q. Do you recall how often you discussed this?

A. About every time I took off work. About every day I missed, because I called in for my back hurting.

Q. How much work did you miss because of your back?

A. Quite a bit. It got so bad that it was getting to be quite a bit.³

5. Claimant does not allege any specific incident or traumatic event caused his injury. Rather, claimant describes the everyday duties of his job as causing a gradual worsening or aggravation of his condition. He describes his present symptoms as follows:

Q. Now, so we're clear on this, what physical complaints do you have today besides just pain, and where is that pain localized?

A. My lower back, it's just in pain, shoots down my leg. If I'm on my feet for more than a couple hours or walk any distance at all, it just gets so intense that I can't walk no further. I have to sit down, and that doesn't help, it still hurts so bad. I need surgery on it, there's something, it's just getting worse.⁴

6. Claimant does not recall discussing the possibility of making a claim for workers compensation benefits before he was terminated. He was submitting his medical bills to the respondent's health insurance carrier. He likewise planned to have his surgery paid for by the health insurance up until the time he was terminated.

7. Mr. Julian and Mr. George Hupach testified for respondent. Mr. Hupach is respondent's personnel manager and, as such, is responsible for processing and handling any workers compensation claims. He denied having any knowledge that claimant was alleging his back problem was work related until sometime in March of 2001, after claimant

³ Tr. of Preliminary Hearing May 22, 2001, at 24-25.

⁴ Tr. of Preliminary Hearing May 22, 2001, at 14.

had been terminated. Up until that time, respondent apparently had not notified nor submitted any of claimant's medical bills to its workers compensation insurance carrier. Mr. Hupach does recall discussing the company disability and medical programs with claimant after Mr. Julian told claimant to meet with him. This conversation took place sometime in the late fall of 2000. Mr. Hupach did not know whether or not claimant told Mr. Julian that his back injury was related to work but neither claimant nor Mr. Hupach remembers the subject of workers compensation being discussed during their conversation. Mr. Hupach was not involved in the decision to terminate claimant.

8. Mr. Julian testified that he was aware of claimant's back problems and of claimant's need for surgery when he terminated claimant for absenteeism. He also admitted that he discussed with claimant the possibility of filing a workers compensation claim in order for claimant to get treatment for his back. Nevertheless, Mr. Julian denied that claimant ever said that his back problems were caused by work.

Q. Did you ask him to see Mr. Hupach about what benefits might be available to him?

A. Yes, I did.

Q. Did you also have some discussion with Mr. Colburn regarding the filing of a workers' compensation claim?

A. One time we talked about it. I told him that he needed to do something about his back, regardless of whether it was workman's comp or private doctor, whatever. Gary is a good man and I hate to see him just totally destroying his back.

Q. What response did he make, if any, regarding workers' comp or the filing of a workers' compensation claim?

A. At one time point in time, he told me he didn't think it happened down there.

Q. Thought it was some old injury or something?

A. That's what he was saying, yes.

Q. After that discussion, did he ever talk to you about filing a workers' compensation claim?

A. No.⁵

9. Mr. Julian agreed, however, that claimant's back problem got progressively worse and appeared to be exacerbated by his work. That is why Mr. Julian told claimant to see a doctor.

Q. And just so we're clear on this, your testimony is that you observed Mr. Colburn at his job and his back appeared to become progressively worse because of his work?

⁵ Tr. of Preliminary Hearing May 22, 2001, at 39.

A. Yes.

Q. And this is over a period of time?

A. Yes.⁶

CONCLUSIONS OF LAW

1. For an injury to be compensable, a claimant must prove that the injury was caused by an accident which arose out of and occurred in the course of employment.⁷ An injury is also compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁸ In such cases, the test is not whether the accident caused the condition, but whether the accident aggravated or accelerated a preexisting condition.⁹

2. Workers have the burden of proof to establish their rights to compensation and to prove the various conditions upon which those rights depend.¹⁰

3. "Burden of proof" means the burden to persuade by a preponderance of the credible evidence that a party's position on an issue is more probably true than not when considering the whole record.¹¹

4. Claimant relates his injury to his work. The medical records in evidence neither specifically relate claimant's back condition to his work, nor do they exclude work as a cause. Based upon the record compiled to date, the Appeals Board finds that claimant has proven he suffered accidental injury while working for respondent.

5. In addition, claimant has proven that he gave respondent timely notice of his accident.¹²

⁶ Tr. of Preliminary Hearing of May 22, 2001, at 46.

⁷ K.S.A. 44-501(a).

⁸ Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971); Hanson v. Logan U.S.D. 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* ___ Kan. ___ (2001).

⁹ Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

¹⁰ K.S.A. 44-501(a).

¹¹ K.S.A. 44-508(g).

¹² K.S.A. 44-520.

6. As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.¹³

WHEREFORE, the Appeals Board reverses the June 28, 2001 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore, and remands this matter to the Administrative Law Judge for further orders consistent with the above findings and conclusions.

IT IS SO ORDERED.

Dated this ____ day of October 2001.

BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

¹³ K.S.A. 44-534a(a)(2).